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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 744

MONROE J. STEWART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 326–327) is reported at 131 F. (2d) 624.

JURISDICTION

The judgment of the circuit court of appeals was entered December 5, 1942 (R. 328), and a petition for rehearing (R. 330–331) was denied January 16, 1943 (R. 332). The petition for a writ of certiorari was filed February 16, 1943. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the indictment was fatally defective for indefiniteness and uncertainty.

2. Whether petitioner was deprived of a fair trial by reason of alleged misconduct of the prosecuting attorney.

3. Whether the trial court improperly admitted testimony of statements made by alleged co-conspirators outside of petitioner's presence.

STATUTE INVOLVED

The statute under which petitioner was convicted (Section 88, Title 18, United States Code) reads in so far as pertinent as follows:

> "If two or more persons conspire * * * to commit any offense against the United States, * * * each * * * shall be fined not more than $10,000, or imprisoned not more than two years, or both."

STATEMENT

Petitioner and his brother, John D. Stewart (R. 263), and J. C. Lewis and Daniel J. Stephens were indicted on March 19, 1942, in the District Court for the Middle District of Alabama in one count charging that they, together with fourteen

other persons named as co-conspirators but not as defendants, and other persons unknown to the grand jury, conspired contrary to 18 U. S. C. Section 88 to violate various provisions of the internal revenue laws relating to liquor, and the provisions of the Criminal Code against extortion by an informer and misprision of felony (§§ 145, 146; 18 U. S. C. 250, 251) (R. 2–11).

Petitioner's demurrer to the indictment (R. 11–13) was overruled (R. 59). A severance was granted as to the defendant John D. Stewart (R. 305–306), and the court directed a verdict as to the defendant Stephens (R. 197, 306). The jury found the defendant Lewis not guilty and petitioner guilty (R. 14, 15). Petitioner was sentenced to two years' imprisonment (R. 15–16) and his conviction was affirmed on appeal (R. 328).

The case proved under the indictment may be summarized as follows:

In January 1939, the defendant John D. Stewart, brother of petitioner, became sheriff of Coffee County, Alabama (R. 60, 263). Among his deputies was one Walker Thomas, who was killed in June or July, 1940 (R. 117–118, 263). Petitioner joined his brother's staff as a deputy in October 1939, and the defendant Lewis was hired in the same capacity sometime after Thomas' death (R. 112, 168, 241, 263). The Government introduced testimony of a number of bootleggers who had carried on their operations in the county show-

ing that shortly after he took office, and continuing through 1942, Sheriff Stewart, personally and through petitioner and his other deputies, solicited and received from the witnesses various sums of money, in consideration of which it was agreed that the Sheriff's office would not interfere with their bootlegging activities and would warn them whenever federal agents came into the county (R. 61–64, 102–106, 108, 113, 117, 118, 131–132, 134–135, 156–157, 158–159). This "protection" continued so long as the bootleggers continued their payments, but when they ceased to do so they were raided by Sheriff Stewart, petitioner, or other deputies (R. 64–65, 72–73, 104–105, 122, 126, 133–135, 139–140, 157).

The testimony also showed a close association between petitioner and one John Henry McDuffie, a notorious wholesale bootlegger (R. 79, 133, 145; see also R. 93), who often acted as a go-between for the Sheriff's office in soliciting and receiving "protection" payments from other bootleggers (R. 131, 147, 156–157, 158; see also R. 84). On several occasions petitioner sent McDuffie to warn "protected" bootleggers that federal agents were in the county (R. 110–111, 157). Petitioner and McDuffie were often seen together (R. 78, 92, 115–116, 145, 184), and there was testimony that petitioner was in or near McDuffie's home on numerous occasions when

illicit liquor was being sold there (R. 79–80, 145–146). At one time McDuffie was seen unloading liquor at his home from an automobile which had been seized one week before by petitioner and the defendant Lewis from Walter L. Parker, an admitted bootlegger (R. 80–81, 95–97, 258–259).

On another occasion Lewis and one Johnson, who was assisting him, chased and caught W. J. Chancellor with a load of liquor (R. 175–176, 185). During the chase Johnson shot at and hit Chancellor's car (*ibid.*). Chancellor was taken to Sheriff Stewart and petitioner, who released him and his car after he had promised to pay them $100, which he did later pay to Lewis (R. 176–177, 179, 187, 192–193). Some time later federal agents seized Chancellor's car while it was being used by one Heath to transport liquor (R. 177, 186). The agents went to see petitioner about the bullet holes in the car and inquired whether any of the Sheriff's deputies had chased Chancellor in it. Petitioner admitted that the car had been chased but stated that the driver had escaped and that the Sheriff's office did not know his identity. R. 186–187). A few days later Lewis went to Chancellor and told him to tell the agents the same story if they questioned him (R. 178–179). Lewis also told Johnson to say nothing about the incident "because he didn't want to be exposed" (R. 186).

There was also evidence that petitioner was himself engaged in the illicit liquor business. On one occasion he instructed J. C. McDuffie, whom he employed in his produce business (see R. 75, 86–87, 89), to take some spoiled peaches to a designated person who would make them up into liquor (R. 83–84). Mary Emma Balkcom testified that petitioner had her arrange to buy a quantity of liquor and promised to pay her for it when it was delivered. Petitioner and John Henry McDuffie procured containers for the liquor from the local courthouse, and after it had been delivered to and paid for by Mrs. Balkcom petitioner cached it in a secluded spot. Later petitioner and McDuffie buried the liquor in Mrs. Balkcom's garden, whence it was stolen. (R. 151–156) Mrs. Balkcom also testified that petitioner, the defendant Lewis, and John Henry McDuffie proposed that she lure bootleggers into the county, where their liquor would be seized, and in return they proposed to give Mrs. Balkcom half of such liquor, which she would be at liberty to sell provided she paid them $5.00 a week for "protection" (R. 158–159).

ARGUMENT

I

No substantial question is presented by petitioner's contention (Pet. 13–15) that the indictment was fatally defective for failure to inform petitioner of the charges against him. The indictment charged generally that the defendants and

co-conspirators not named as defendants conspired to violate the internal revenue laws relating to alcoholic beverages, their manufacture, transportation, and sale, and the laws relating to extortion by an informer and misprision of felony. It alleged that the conspiracy "contemplated more than one offense of the character hereinafter described" (R. 3), and then set out with particularity the nature of the substantive offenses encompassed by the conspiracy (R. 4–5). It should be noted that there is no contention that the indictment did not charge the necessary elements of a conspiracy to commit offenses against the United States, and it is apparent from an examination of the indictment as a whole that petitioner could not have been in doubt as to the nature of the conspiracy alleged or as to the manner in which it was to have been effected. And though it is true that the indictment did not allege particulars as to persons, times, places, and circumstances, such details are not essential to the sufficiency of a conspiracy indictment. *Glasser* v. *United States,* 315 U. S. 60, 66; *Wong Tai* v. *United States,* 273 U. S. 77, 81; *Joplin Mercantile Co.* v. *United States,* 236 U. S. 531, 548–549; *Crawford* v. *United States,* 212 U. S. 183, 191–192; *Williamson* v. *United States,* 207 U. S. 425, 447–448, 449. "Such specificity of detail falls rather within the scope of a bill of particulars" (*Glasser* v. *United States, supra*), and petitioner did not seek particulars in the trial court.

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Nor is there any merit in petitioner's argument (Pet. 8, 10, 13) that the offenses of extortion by an informer and misprision of felony (Criminal Code, §§ 145, 146 (18 U. S. C. 250, 251)), which were alleged as objects of the conspiracy (R. 5), are unrelated to the alleged objective offenses against the internal revenue laws relating to liquor. While the indictment did not specify the particular offenses involved in the phases of the conspiracy having to do with extortion and concealment of felonies, it is apparent from the context that these were offenses against the provisions of the internal revenue laws specified in the indictment. Moreover, substantially all of the allegations of overt acts (R. 5–10) concerned specific acts of extortion and concealment in connection with offenses against the internal revenue laws. Hence, there is no basis for petitioner's claim that the indictment was bad because it charged a conspiracy to commit unrelated offenses. See *Ford* v. *United States,* 273 U. S. 593, 602; *Frohwerk* v. *United States,* 249 U. S. 204, 209–210; *United States* v. *Rabinowitch,* 238 U. S. 78, 86; *Schefano* v. *United States,* 84 F. (2d) 513, 515 (C. C. A. 5); *Hogan* v. *United States,* 48 F. (2d) 516, 517 (C. C. A. 5), certorari denied, 284 U. S. 668; *McDonnell* v. *United States,* 19 F. (2d) 801, 803 (C. C. A. 1), certiorari denied, 275 U. S. 551.

II

Petitioner's contention (Pet. 5–6, 11–13) that the prosecutor was guilty of prejudicial mis-

conduct is without merit. The grounds of his complaint will be considered in sequence.

(a) After a witness for petitioner had testified that petitioner's character and reputation were good the trial court asked the prosecutor whether he proposed "to offer any testimony contrary to the defendants' testimony." The prosecutor's answer, of which petitioner complains (Pet. 11), was that "We have got some but we won't use it." (R. 239.) However, the trial court immediately admonished the prosecutor that his remark was improper and excluded the statement (R. 239–240). Plainly, therefore, no prejudice resulted.[1]

[1] There is likewise no substance in petitioner's complaint that the prosecutor stated, contrary to the facts, that certain girls were "in the liquor business and assisting in the liquor business" (Pet. 12). In the sequence to which petitioner refers the prosecutor asked Government witness Mrs. J. C. McDuffie whether she had ever seen petitioner and John Henry McDuffie "together with any girls." There was an objection and the court asked the prosecutor whether he expected to show that "those girls were in the liquor business, assisting in the liquor business." The prosecutor answered in the affirmative, and the court overruled the objection. (R. 92.) Petitioner states that "This was not true, and no effort was made by the Assistant District Attorney to show that Willie Mae Hobbie [one of the girls referred to] had any connection with the liquor business" (Pet. 12). The facts are, however that the subsequent testimony of Mrs. Balkcom shows clearly that she had trafficked in illicit liquor and that on one occasion Mrs. Hobbie and petitioner accompanied Mrs. Balkcom and John Henry McDuffie during part of a trip the latter two made to arrange to purchase some whiskey for petitioner (R. 151–156). There was, in addition, testimony that Mrs. Hobbie was associated

Petitioner cites seven other instances (Pet. 11) wherein he contends that he was prejudiced by the prosecutor's alleged assumption of "prejudicial facts not in evidence." In three of the instances cited (R. 68, 78, 139) there was no assumption of unproved facts, but on the contrary, the prosecutor simply stated facts to which the witnesses had previously testified (compare R. 68 with R. 66, R. 78 with R. 77, and R. 139 with R. 134–135), and in two others (R. 76, 229) the trial court sustained objections to the prosecutor's statements and excluded them from the consideration of the jury (R. 77, 229).[2] In respect of the remaining instance relied upon by petitioner (R. 145), the record discloses that on direct examination Government witness Noah Wood testified that he had been employed by petitioner and the defendant Lewis in 1941 as a truck driver (R. 141); that during a conversation with Lewis the latter told him that "they had better park the truck, it wasn't making them any money"; and that he stated to Lewis that "if it wasn't making

with petitioner in bootlegging activities (R. 292, 294–295); and though on cross-examination Mrs. Hobbie denied such association, the credibility of the witnesses was for the jury to determine.

[2] In another of the instances cited by petitioner (R. 218–219), there was no objection to the prosecutor's question and, moreover, it occurred during the prosecutor's cross-examination of a character witness for petitioner and defendant Lewis and was clearly legitimate to show the witness's unfamiliarity with Lewis' activities.

enough by doing things justable [*sic*], I wasn't going to do anything unjustable and I reckon we would have to park it" (R. 143). On redirect examination the prosecutor asked Wood, "Just what did you tell him you wouldn't do unlawful?" There was an objection and then, evidently in explanation of what he expected to establish by the question, the prosecutor stated, "He said he wouldn't haul liquor in it and he would have to park the truck." Petitioner's counsel insisted that Wood had made no such statement and the court thereupon told Wood to step down (R. 145), thus preventing the prosecution from obtaining the expected answer. However, assuming that the prosecutor's statement was improper, it furnishes no basis for any claim of prejudicial error, for the witness had testified on cross-examination that he had done nothing unlawful during his employment by petitioner and Lewis (R. 144).[3]

[3] The prosecutor's statement, quoted on page 12 of the Petition, to the effect that it would be to the defendants' interest to "make * * * cases" against bootleggers who were not "paying off" (R. 254), was made in support of the prosecutor's objection to defense counsel's questioning of the clerk of the circuit court for Coffee County, called as a witness for the defense, regarding the number of convictions in that court in liquor cases during Sheriff Stewart's tenure (R. 254–255). The validity of the prosecutor's objection is indicated by the court's ruling that "Of course the fact that they arrested others, cases made against others would not be any defense, that they were not protecting these particular ones. I believe I will limit it to these people who have testified as witnesses in the case" (R. 255).

(b) Petitioner asserts (Pet. 5, 12) that the prosecutor assumed a bullying and insulting attitude toward defense witnesses. One of the witnesses involved in the instances cited (*ibid.*) was called as a character witness on behalf of petitioner and another on behalf of petitioner and the defendant Lewis and the prosecutor's cross-examination sought merely to show that these witnesses were unfamiliar with petitioner's activities in selling "protection" to bootleggers (R. 214–215, 216–219). The cross-examination of Lewis' former employer, another of the witnesses involved (R. 219), elicited that he knew nothing of Lewis' bootlegging activities (R. 220–221). In the final instance cited, after the witness had stated that he "imagined" a certain case was "still pending," the prosecutor merely reminded him that he was under oath and told him to testify only to matters within his own knowledge (R. 228–229). It is clear that the conduct of the prosecutor in his cross-examination of these witnesses did not exceed the limits of propriety and that petitioner's assertions of prejudice are groundless. Moreover, the scope and extent of cross-examination is within the discretion of the trial judge (*District of Columbia* v. *Clawans,* 300 U. S. 617, 632; *Alford* v. *United States,* 282 U. S. 687, 694; *Blitz* v. *United States,* 153 U. S. 308, 312), and, in addition, objections by defense counsel to specific

questions asked of the witnesses were sustained by the court (R. 215, 217, 218).[4]

(c) Petitioner also claims (Pet. 5–6, 11) prejudicial error in the remark of the prosecutor during his closing argument to the jury that in his opinion the testimony of the Government's witnesses showed "beyond all reasonable doubt that * * * [petitioner and the defendant Lewis] are guilty as charged" (R. 305). Petitioner has evidently confused the prosecutor's right to comment with the more limited right of the judge (*United States* v. *Murdock,* 290 U. S. 389; *Horning* v. *District of Columbia,* 254 U. S. 135). Of course a prosecutor can express to the jury the view that the evidence shows the defendant guilty; such an expression is implicit in every prosecutor's closing argument urging that the defendant be convicted. See *United States* v. *Holt,* 108 F. (2d) 365, 369–370 (C. C. A. 7), certiorari denied, 309 U. S. 672; *Di Carlo* v. *United States,* 6 F. (2d) 364, 368 (C. C. A. 2), certiorari denied, 268 U. S. 706; *Tuckerman* v. *United States,* 291 Fed. 958, 969 (C. C. A. 6), certiorari denied, 263 U. S. 716.

[4] Petitioner also cites (Pet. 12) the remark, "Just spit it out" (R. 107), which the prosecutor made to Government witness Arnett (R. 102), an admitted bootlegger (R. 103), on direct examination. The court sustained an objection to the statement but admonished the witness to answer directly or, "If you don't know say you don't know." At the same time the court, after an objection by the District Attorney, reprimanded defense counsel for insinuating that the defendants were not being given a fair trial. (R. 107.)

In sum, there is nothing in the incidents of which petitioner complains to support his contention that the prosecutor's conduct comes within the condemnation of this Court's decisions in *Berger* v. *United States,* 295 U. S. 78, and *Williams* v. *United States,* 168 U. S. 382, upon which petitioner relies. See also *Viereck* v. *United States,* No. 458, decided March 1, 1943. Moreover, as the court below said, the proof of petitioner's guilt was "clear and substantial" (R. 327; see also pp. 3–6, *supra*), and petitioner does not challenge this holding. In view of the great weight of the evidence, even if there was any impropriety in the incidents complained of they cannot be said to have affected petitioner's substantial rights and therefore do not constitute reversible error (28 U. S. C. 391). See *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 239–240; *Moore* v. *United States,* 132 F. (2d) 47, 48 (C. C. A. 5), certiorari pending, No. 745; *Weathers* v. *United States,* 126 F. (2d) 118, 119 (C. C. A. 5), certiorari denied, 316 U. S. 681; *Leche* v. *United States,* 118 F. (2d) 246, 247 (C. C. A. 5), certiorari denied, 314 U. S. 617; *United States* v. *Buckner,* 108 F. (2d) 921, 928–929 (C. C. A. 2), certiorari denied, 309 U. S. 669.

III

Petitioner cites several instances (R. 61–63, 77, 84, 109–110) in which he claims that the trial judge committed reversible error in admitting

hearsay testimony as to statements and declarations made to the witnesses, outside of petitioner's presence, by certain of the alleged co-conspirators (Pet. 6, 15–16). Examination of the alleged errors shows, however, that the judge's rulings on testimony of this nature were correct and that they in fact actually favored petitioner. In the very first instance cited by petitioner and thereafter at intervals throughout the trial and in his final charge the judge instructed the jury that testimony concerning declarations of the various conspirators was admitted only for the purpose of establishing the existence of a conspiracy as alleged in the indictment, and that such testimony could be considered only as against the declarant and others who were present at the time, although they were named only as co-conspirators, and should be given no heed in determining the guilt or innocence of the defendants on trial (R. 61, 76–77, 85, 132, 147, 168, 315–316, 319; see also R. 309).

Moreover, the testimony to which petitioner objects was given by persons named in the indictment as co-conspirators (R. 2–3, 60, 75, 102) and consisted of declarations of others of the conspirators either in furtherance of the purposes of the conspiracy or with reference to its common objects. Since there was abundant proof *aliunde* that petitioner was connected with the conspiracy the items of evidence complained of could have been admitted against him. *Glasser* v. *United*

States, 315 U. S. 60, 74; *Delaney* v. *United States,* 263 U. S. 586, 590; *Clune* v. *United States,* 159 U. S. 590, 593; *United States* v. *General Motors Corporation,* 121 F. (2d) 376, 408 (C. C. A. 7), certiorari denied, 314 U. S. 618, rehearing denied, 314 U. S. 710; *United States* v. *Woods,* 66 F. (2d) 262, 265 (C. C. A. 2); *Lewis* v. *United States,* 11 F. (2d) 745, 747 (C. C. A. 6); *Weinstein* v. *United States,* 11 F. (2d) 505, 508 (C. C. A. 1), certiorari denied, 273 U. S. 699; *Isenhouer* v. *United States,* 256 Fed. 842, 843 (C. C. A. 8). Petitioner was, therefore, favored, in view of the limited purposes for which the evidence was admitted.

CONCLUSION

The decision below is correct, and there is involved no conflict of decisions or question of general importance. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

ROBERT S. ERDAHL,
J. BENSON SAKS,
Attorneys.

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